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OFFICE OF THE CLERK

No. 95-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

CATHERINE T. TYTOR,

Petitioner,

v.

THE BOARD OF TRUSTEES OF LARAMIE COUNTY SCHOOL DISTRICT NO. 2; RONALD L. WHITE, individually and in his official capacity as Superintendent; and, JAMES M. BENOIT, individually and in his official capacity as Director of Special Services,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the current test fashioned by this Court for protecting the free speech of public employees adequately safeguards the rights of those employees subjected to broad, vague prior restraints by governmental employers?

PARTIES TO THE PROCEEDING

The caption of the case contains the names of all the parties.

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PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE SUPREME COURT:

Catherine Tytor respectfully petitions for a writ of *certiorari* to review the judgment of the Court of Appeals for the Tenth Circuit affirming the trial court's summary

judgment denying her claim for violation of her constitutional rights of expression and association.

OPINIONS BELOW

The opinion of the Tenth Circuit Court of Appeals is unpublished and is reprinted in Appendix A. The Order denying rehearing appears in Appendix B. The United States District Court for the District of Wyoming's Order Granting the Defendants' Motion for Summary Judgment is not reported and is reprinted at Appendix C.

JURISDICTIONAL STATEMENT

The Tenth Circuit Court of Appeals issued its opinion on March 1, 1995, and entered its Order denying petition for rehearing on April 3, 1995. Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging freedom of speech, or of the press; or the right of the people peaceably to assemble, and petition the government for a redress of grievances.

STATEMENT OF THE CASE

A. Factual Background.

Catherine Tytor was employed by Laramie County School District No. 2 as a speech and language teacher from September 1988 through May 1991. During these

three years, her supervisor, Director of Special Services James Benoit, consistently evaluated her teaching abilities and rapport with students as outstanding. During her final year, Benoit and Superintendent Ronald White imposed a prior restraint which prevented her from associating and conversing with her professional colleage, Dr. Casper Ferneti, the school psychologist, on any topic during school hours. Tytor and Ferneti each traveled throughout the District to provide special education services at elementary and high schools in the four rural communities within the District. Tytor conferred and consulted with Dr. Ferneti prior to the ban in order to provide the best possible special education services to the District's students. The administration did not care if its ban prevented Tytor from discussing innovative ideas in special education or the manner in which the District administered its special education program. As Tytor testified, "No matter what we talked about, no matter where we were, no matter what we did, we couldn't do it on a free basis." The administration ordered Tytor to arrange her schedule so that she and Ferneti were never in the same community at the same time. The administrators even prohibited Tytor from using her assigned desk if Ferneti was also at his desk, as the two educators shared the same office.

The District did not place similar restrictions on Ferneti, who enjoyed a flexible schedule that varied on a daily basis. Therefore, Tytor was faulted for any perceived violation of the ban. Benoit found fault with Tytor for her mere presence in the same building as Ferneti, never bothering to ask for an explanation.

The stated purpose of the gag order was to quell perceptions by unidentified staff members that Tytor and Ferneti were pursuing "hidden agendas." None of the

special services staff has admitted to harboring such perceptions about Tytor and Ferneti. Absolutely nothing in the record suggests any unprofessional communications or contacts between them. Neither Benoit nor Superintendent Ronald White acted to mend staff relations or to address misperceptions or misunderstandings through increased communication. Instead, the administration's solution was to cut off personal communication between Tytor and Ferneti. The responsibility was placed solely on Tytor to avoid all interaction with Ferneti during school time, except, possibly for telephone communication or memoranda, provided the two were in different towns.

At a March 7, 1991, meeting, the administration decided to recommend to the Board of Trustees that Tytor's contract for employment not be renewed for a fourth year. The Board of Trustees adopted and ratified, without discussion, the recommendation. Tytor learned of the administration's decision by written notice in her final performance evaluation. The "goals" section of the evaluation emphasized Tytor's purported failure to avoid contacts with Ferneti during school hours:

> It appears as if our request to you to make sure that your schedule and Dr. Ferneti's constricts your contact during school hours, except when necessary to meet the needs of testing or meetings, that this is often ignored or circumvented.
>
> . . . .
>
> You are not recommended for a continuing contract.

The District presents no evidence whatsoever that its service to students was disrupted as a result of Tytor's contacts with Ferneti. To the contrary, her performance evaluations rate her effectiveness with students highly,

and Benoit considered her to be an innovative and effective teacher up to the time of her discharge. Tytor's skill played no part in the District's decision to end her employment. Instead, the District punished Tytor for speaking and associating with the school psychologist in complete disregard of the interest of those, especially the students, who stood to benefit from Tytor's speech and concern.

B. Proceedings Below.

Petitioner Catherine Tytor brought this action in the United States District Court for the District of Wyoming to recover her damages resulting from her unlawful termination by Laramie County School District No. 2, Superintendent Ronald L. White and Director of Special Services James M. Benoit. Tytor asserted claims for (1) violation of the constitutional rights of expression and association, (2) breach of contract, and (3) intentional infliction of emotional distress.

The school district filed a motion for summary judgment on all claims on June 4, 1993. Following a hearing, the district court granted the motion for summary judgment as to all claims on August 9, 1993. The district court found that Tytor's speech was not protected under the First Amendment to the United States Constitution as it did not rise to the level of public concern necessary for constitutional protection under the prior decisions of this Court.

Tytor timely filed her Notice of Appeal to the United States Court of Appeals for the Tenth Circuit on August 30, 1993, to contest the district court's finding that her speech did not merit constitutional protection. Petitioner did not appeal from the district court's grant of

summary judgment on her contract and emotional distress claims. The appeals court affirmed the grant of summary judgment by the district court in an unpublished Order and Judgment dated March 1, 1995. The appeals court held that Tytor failed to produce evidence that she was fired because of a *specific* statement she made that was of public concern. "That failure defeats her claim and it is not necessary to analyze the case further. . . ." *Order and Judgment*, Appendix A. The district court was unimpressed with the school district's stated reason for its prior restraint of Tytor's speech. The court stated that the "vagueness of the policy and its purpose" would have given "little support and comfort" to the school district if the court had not been stopped in its analysis by Tytor's perceived failure to show that she was punished for speaking or trying to speak on matters of public concern. Appendix A.

On March 15, 1995, Catherine Tytor filed a petition for rehearing and suggestion for rehearing *en banc* upon the grounds that the decision was contrary to prior opinions of the Tenth Circuit and that it upheld an impermissible prior restraint on speech on matters of public concern. The Court of Appeals for the Tenth Circuit denied the petition without opinion in an order entered on April 3, 1995.

REASONS FOR GRANTING THE WRIT

The court below misdirected the frustration it felt over this case at Catherine Tytor. The court chastised Tytor for failing to identify specific statements she made regarding matters of public concern that resulted in her termination. The court's consternation should have, instead, been directed at the inadequacy of the *Connick/Pickering* test in evaluating blanket prior

restraints on the free speech of governmental employees such as the one presented by this case. The test was not developed in cases involving broad prior restraints, but rather in cases of *post hoc* disciplinary actions taken in retaliation for specific statements by the employee. The use of the test in cases involving prior restraints allows public employers to chill protected speech regardless of whether it is distruptive to the mission of the governmental entity. This petition for *certiorari* should be granted to tailor a new form of analysis that will ensure that the free speech rights of public employees will be protected by judicial scrutiny from the chilling effect of broad prior restraints.

The analysis used by this Court and lower courts for determining the First Amendment rights of government employees in the workplace has two prongs. First, a court must determine whether the employee's speech touches upon a matter of public concern. *Connick v. Myers*, 461 U.S. 138 (1983). If the speech involves a matter of public concern, then a court must balance the interests of the speaker against the public employer's interests in effective and efficient fulfillment of its duties. *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968).

The Court of Appeals for the Tenth Circuit opened its unpublished decision in this case by stating that its "review was made difficult by the failure of the plaintiff to present particular facts to support any determination that the school district or the individual defendants restrained her or retaliated against her with respect to speech on matters of public concern." *Order and Judgment*, Appendix A. Chastising Tytor was understandable given that the Tenth Circuit was trying to fit her case into the mold of the *Pickering* and *Connick* cases. The court

below failed to recognize that it was trying to cram Tytor's case, a square peg, into the *Connick/Pickering* test, a round hole. *Pickering* and its progeny each involved *post hoc* disciplinary actions taken in retaliation for specific statements made by the employee. *United States v. National Treasury Employees Union*, 63 U.S.L.W. 4133, 4137 (U.S. Feb. 22, 1995). This case does not fit that mold, as Tytor was not terminated because of a specific statement or statements she made, but because she violated a broad, vague ban on all speech to a colleague during the school day. Defendant Laramie County School District No. 2 fired her for failing to curtail her "contacts" with Dr. Casper Ferneti, the school psychologist, during the school day. District administration did not pinpoint any offending statements as it considered all statements, including those of public concern, to violate the prior restraint. No specific speech by the employee, therefore, can be identified for the court to analyze under the *Connick/Pickering* test to determine if it was of public concern.

In reality, the school district administration would have fired her for speaking, as a citizen, about matters of public concern or as an employee, upon matters of only personal concern. The school administrators were not concerned about the content of her speech, but the appearance it would create. In that respect, the school administration's broad ban is analogous to the ban on the payment of honoria for speeches by federal employees recently struck down by this Court in *National Treasury Employees Union, supra*. The honoria ban did not prohibit all speech by federal employees[1] nor did it discriminate among speakers based on the content or

---

[1] Federal employees were able to speak to groups outside of work but not for pay.

viewpoint. The prior restraint on Tytor, likewise, did not prohibit all speech between herself and Dr. Ferneti and it was not aimed at the content of her speech. Both prohibitions, however, imposed significant burdens on expressive activity. Both deterred a wide range of speech even before it is uttered, based only on speculation that the speech might threaten the government's interests.

This Court has a litany of cases reciting the chilling effect of prior restraints on free speech, such as the one inflicted upon Catherine Tytor. *See, e.g., Near v. Minnesota*, 283 U.S. 697 (1931); *New York Times v. United States*, 403 U.S. 713 (1971). As the Court noted in *National Treasury Employees Union*, courts have no way "to measure the true cost" of the burden placed upon free speech by a prior restraint because they can only speculate what speech might have been prevented. 63 U.S.L.W. at 4138. The prior restraint placed on Tytor, by definition, was aimed at protected speech as well as speech that the district might have rightfully prohibited under the *Pickering* balancing test. One can only speculate about the exact nature and amount of protected speech chilled by the school district's vague prior restraint of Tytor.

The honoria ban, of course, affected a great number of employees, while the prior restraint in Tytor's case affected only one employee.[2] However, if the government cannot take away the individual rights from a large group of employees, it should not be able to take them away from an individual employee. The fact that the prohibited speech took place between two individuals in a private conversation in an academic environment rather than in a publication or public gathering, does not

[2]The ban did not apply to Dr. Ferneit, but only to Tytor.

deprive it of its public import and protection. *Rankin v. McPherson*, 483 U.S. 378, 386 (1987). Freedom of speech grows not only from society's need for open and robust debate, but also from the entitlement of the citizen. Free speech is intimately intertwined with human dignity and autonomy; it protects and provokes the expressive spirit. The vague gag placed on Tytor not only hindered the search for truth in the tiny community of Pine Bluffs, Wyoming, but it also denied her the right to speak her mind and to associate as she saw fit with her professional colleagues without jeopardizing her livelihood.

This Court in *Pickering* recognized that the government has greater authority to infringe the free speech of employees than it has to muzzle its citizens. However, that greater authority is based on the public's interest in seeing that governmental entities efficiently accomplish their public mission. That care be taken in determining whether speech is actually disruptive to the governmental employer's public service was emphasized in *Waters v. Churchill*, 114 S.Ct. 1878 (1994), where this Court held that the government must use the care of a reasonable employer in investigating an employee's speech to determine if it is disruptive. This Court held "that the possibility of inadvertently punishing someone for exercising her First Amendment rights make such care necessary." *Id.* at 1889. A broad, vague prior restraint on employee speech, such as the one at issue here, creates the real danger that speech which does not disrupt the functioning of the public entity will be punished, whether inadvertently or not.

This Court has also recognized that "[v]igilance is necessary to ensure that public employers do not use authority over employees to silence discourse" when it

does not hamper public functions. *Rankin*, 483 U.S. at 385. The rights of teachers to speak and associate in the schools merits diligent scrutiny by the courts. *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. . . . [I]nhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of those amendments vividly into operation." *Id.* Such vigilance is impossible when a prior restraint is imposed on an employee. An employee's discourse is silenced regardless of whether it would be truly disruptive to the government's mission.

This Court's current analytical framework allowed Laramie County School District No. 2 to muzzle an employee's speech despite little evidence of disruption to the district. The Tenth Circuit found that the vagueness of the policy and its purpose offered little support for a claim by the school district that the policy was aimed at preventing disruption of the district's responsibilities. The district was able to avoid the scrutiny of the court because it chose to impose a general ban rather than a narrowly-tailored ban that would encompass only the speech that would truly disrupt the functioning of the district. This result creates an anomaly where an employee who makes one or two statements for which she is fired has more protection than an employee whose free speech rights are smothered by a broad prior restraint. The latter employee may be fired without recourse to the courts for simply violating that ban without regard to whether the offending speech is actually disruptive.

The governmental employer need not specify the offending speech to justify a worker's termination, but need only state that the prior restraint was violated. In

fact, the employer would be wise not to specify the exact speech that violated the ban. The employer would only have to look at the example of Tytor to learn that if the employee cannot point to any specific speech for which she was fired, then that employee cannot successfully bring an action for wrongful termination. If the employer was pressured to be specific in identifying the offending speech, it could pick speech that was not of public concern because the blanket ban applied to all speech by the employee whether it was of public concern or not. A crafty government employer could escape scrutiny for a prior restraint that was far more restrictive of speech than the *post hoc* infringements addressed by the *Pickering* lines of cases.

The *Pickering* balancing test can still be applied to blanket prior restraints such as the one involved in the case at hand. However, the threshold requirement that the employee make a specific showing that the speech for which she was fired was of public concern should be dropped. The requirement is not needed because a blanket ban on speech, by definition, is aimed at preventing speech of public concern as well as all other speech. More importantly, the requirement permits governmental entities to escape judicial scrutiny while imposing wide-ranging prior restraints that freeze more speech than *post hoc* disciplinary actions for which the Court has provided protection. Therefore, the current analysis must be replaced in cases involving blanket prior restraints to preserve the right of the individual employee to speak her mind and to keep the path of truth free of unnecessary obstacles.

CONCLUSION

For the reasons stated above, the petition for *certiorari* should be granted.

Respectfully submitted,

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July 3, 1995

APPENDIX A

[Filed Mar 01 1995]

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 93-8082
(D.C. NO. 93-CV-0023-B)
(District of Wyoming)

CATHERINE T. TYTOR,

Plaintiff/Appellant,

v.

THE BOARD OF TRUSTEES OF
LARAMIE SCHOOL DISTRICT NO. 2;
RONALD L. WHITE, individually and in his
official capacity as Superintendent and
JAMES M. BENOIT, individually, and in his official
capacity as Director of Special Services,

Defendants/Appellees.

ORDER AND JUDGMENT*

Before LOGAN and McKAY, Circuit Judges, and MATSCH,** Chief District Judge

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*This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of the court's General Order filed November 29, 1993. 151 F.R.D. 470.

**The Honorable Richard P. Matsch, Chief United States District Judge for the District of Colorado, sitting by designation.

Catherine T. Tytor was a speech and language teacher employed by Laramie School District No. 2 on annual contracts, beginning in September, 1988. She brought this action in the United States District Court for the District of Wyoming, claiming relief under 42 U.S.C. §1983, contending that she was denied a teaching contract for the 1992-93 school year because of a restriction on her activities in violation of her rights to freedom of speech and freedom of association protected by the First and Fourteenth Amendments of the United States Constitution. The district court granted the defendants' motion for summary judgment on this and other claims for relief under Wyoming law in a written order entered August 9, 1993. The plaintiff appeals only from the dismissal of the federal claim. More particularly, the appellant challenges the district court's determination that speech concerning the education of children with disabilities did not merit constitutional protection.

The district court made the following findings in its written order:

> Plaintiff Catherine T. Tytor ("Tytor") was a speech and language teacher for Laramie County School District No. 2 from September 1988 through May 1991. She worked for one James Benoit ("Benoit"), Director of Special Services, who authored Tytor's written evaluations throughout this period. Dr. Casper Fernetti ("Fernetti") was the school psychologist. Both Tytor and Fernetti provided special education services to elementary school and high school children in the communities of Albin, Burns, Carpenter, and Pine Bluffs, Wyoming.
>
> Starting in Tytor's second year of employment, Benoit directed Tytor to minimize her contact with Dr. Fernetti. Among other things, the restriction

> prohibited Tytor from sitting at her desk, located near Dr. Fernetti's, when Dr. Fernetti sat at his desk. Benoit's concerns in this regard centered around Tytor's strong personality and the negative manner in which co-workers perceived her interaction with Fernetti. Superintendent Ronald White had banned Tytor and Fernetti from travelling together. Ultimately, at the end of Tytor's third year, the school principals recommended to the Board of Trustees not to extend tenure to Tytor, and the Board of Trustee adopted that recommendation without discussion.

The appellant has not disputed the basic facts. In her brief, Tytor has cited record support for the additional factual statement that she consistently received favorable evaluations of her performance from Benoit, with the exception of his criticisms based on perceived failures to follow the directives concerning her avoidance of the school psychologist.

The district court acknowledged the correct standard for determining a motion for summary judgment and we now review the decision *de novo. Conaway v. Smith*, 853 F.2d 789, 792 (10th Cir. 1988).

The review is made difficult by the failure of the plaintiff to present particular facts to support any determination that the school district or the individual defendants restrained her or retaliated against her with respect to speech on matters of public concern. This flaw in the plaintiff's case apparently results from a misapprehension concerning the scope of the protection granted by the First Amendment.

Appellant contends broadly that speech concerning the education of children with disabilities addresses a matter of public concern. The district court characterized

Tytor's contention as a claim that the ban prevented her from speaking with the one person with whom communication was necessary for the performance of her job and the proper discharge of her public function. The record before us does not show any absolute bar to communication between the plaintiff and the psychologist. They were free to exchange memoranda, to communicate by telephone and to meet away from the school buildings after school hours. The defendant's stated objective was the avoidance of an appearance of collaboration because of some perception that Ms. Tytor and Dr. Fernetti were pursuing a "hidden agenda."

The vagueness of the policy and its purpose would give little support and comfort to the defendants if the plaintiff had made some specific showing that she spoke or sought to speak in any form or manner which warrants protection as a matter of public concern. The topic of education of students with disabilities is, generally speaking, of general interest to the public. This is not enough, however, for what the plaintiff actually desired to say on that topic must itself be of public concern. *Connick v. Myers,* 461 U.S. 138, 148 n.8 (1982); *Wilson v. City of Littleton, Colo.*, 732 F.2d 765, 769 (1984). Communications concerning the particular educational needs of individual students are not themselves matters of public interest. Indeed, professionalism dictates that the privacy interests of the pupil and her parents must be protected. Communication between the psychologist and the teacher concerning the students in their charge are matters of their job performance as professional employees of the district, not matters of general interest to the public. *See Connick v. Myers*, 461 U.S. at 147-49.

Certainly, the manner in which this school district was discharging its responsibilities for educating children with

disabilities is an appropriate subject for public comment by those who have direct knowledge of it. There is nothing in the record to show that any such communication was prevented or made. It was incumbent upon the plaintiff to produce such evidence. That failure defeats her claim and it is not necessary to analyze the case further under the sequential process prescribed by this court in *Powell v. Gallentine*, 992 F.2d 1088, 1090 (10th Cir. 1993).

Tytor has made a vague assertion that the defendants violated her First Amendment right to freedom of association. The United States Supreme Court has described two types of association protected by the Constitution.

> In one line of decisions, the Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty. In another set of decisions, the Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion.

Roberts v. United States Jaycees, 468 U.S. 609, 617-18 (1984). Tytor has failed to present a case within either of these categories. She does not contend that she had any interest in an "intimate association" with Dr. Fernetti. Any right of "political association" involved in this case is indistinguishable from her right to free speech because the only "association" denied her was the ill-defined restriction on her contact with the school psychologist. There is no reason to separate speech and association

under these circumstances where the same conduct is prohibited by state action.

The plaintiff's complaint refers to Article I, §§20, 21 and 22 of the Wyoming Constitution as additional support for her claims for relief. She has not shown that the Wyoming Constitution provides any different protection for speech and association rights from those provided by federal law. Accordingly, there is no need for any analysis or discussion of these state constitutional limitations.

Upon the foregoing, it is

ORDERED that the judgment of the district court is AFFIRMED.

AFFIRMED.

ENTERED FOR THE COURT.

Richard P. Matsch, Chief District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 93-8082

CATHERINE T. TYTOR,

Plaintiff/Appellant,

v.

THE BOARD OF TRUSTEES OF
LARAMIE SCHOOL DISTRICT NO. 2;
RONALD L. WHITE, individually and in his
official capacity as Superintendent and
JAMES M. BENOIT, individually, and in his official
capacity as Director of Special Services,

Defendants/Appellees.

ORDER
Entered April 3, 1995

Before LOGAN, McKAY, Circuit Judges, and MATSCH,* District Judge.

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

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*The Honorable Richard P. Matsch, Chief United States District Judge for the District of Colorado, sitting by designation.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc in denied.

Entered for the Court
PATRICK FISHER, Clerk

By: L. Balzano
Deputy Clerk

APPENDIX C

[Filed Aug 9 '93]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

NO. 93-CV-0023-B

CATHERINE T. TYTOR,

Plaintiff,

v.

THE BOARD OF TRUSTEES OF
LARAMIE SCHOOL DISTRICT NO. 2;
RONALD L. WHITE, individually and in his
official capacity as Superintendent; and,
JAMES M. BENOIT, individually and in his official
capacity as Director of Special Services,

Defendants.

ORDER GRANTING THE DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT

The above-entitled matter having come before the Court upon the defendants' motion for summary judgment, and plaintiff's motion in opposition thereto, and the Court having reviewed the materials on file herein, having heard argument from the parties, and being fully advised in the premises, FINDS and ORDERS as follows:

Background

Plaintiff Catherine T. Tytor ("Tytor") was a speech and language teacher for Laramie County School District

No. 2 from September 1988 through May 1991. She worked for one James Benoit ("Benoit"), Director of Special Services, who authored Tytor's written evaluations throughout this period. Dr. Casper Ferneti ("Ferneti") was the school psychologist. Both Tytor and Ferneti provided special education services to elementary school and high school children in the communities of Albin, Burns, Carpenter, and Pine Bluffs, Wyoming.

Starting in Tytor's second year of employment, Benoit directed Tytor to minimize her contact with Dr. Ferneti. Among other things, the restriction prohibited Tytor from sitting at her desk, located near Dr. Ferneti's, when Dr. Ferneti sat at his desk. Benoit's concerns in this regard centered around Tytor's strong personality and the negative manner in which co-workers perceived her interaction with Ferneti. Superintendent Ronald White had banned Tytor and Ferneti from travelling together. Ultimately, at the end of Tytor's third year, the school principals recommended to the Board of Trustees not to extend tenure to Tytor, and the Board of Trustee adopted that recommendation without discussion.

Tytor now sues the School District for unlawful termination based on unconstitutional infringement of her freedoms of speech and association. Tytor also alleges breach of contract and intentional infliction of emotional distress.

Standard of Review

"By its very terms, [the Rule 56(c)] standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there is no *genuine* issue of *material* fact."

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) (emphasis in original).

The trial court decides which facts are material as a matter of law. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.* at 248; *see also Carey v. United States Postal Service*, 812 F.2d 621, 623 (10th Cir. 1987). Summary judgment may be entered "against a party who fails to make a sufficient showing to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Carey*, 812 F.2d at 623. The relevant inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Carey*, 812 F.2d at 623. In considering a party's motion for summary judgment, the court must examine all evidence in the light most favorable to the nonmoving party. *Barber v. General Elec. Co.*, 648 F.2d 1272, 1276 n.1 (10th Cir. 1981).

Discussion

The Court divides its analysis into three parts: (1) whether Tytor's speech is protected under the First Amendment, (2) whether the defendants breached Tytor's employment contract, and (3) whether Tytor suffered actionable emotional distress.

1. Whether Tytor's speech is protected under the First Amendment.

The Tenth Circuit recently summarized the law regarding a public employee's constitutionally protected interest in freedom of expression:

> The court's inquiry in a First Amendment case covers four steps. *Melton v. City of Oklahoma City*, 879 F.2d 706, 713 (10th Cir. 1989), *modified on other grounds*, 928 F.2d 920 (10th Cir.) (en banc), *cert. denied*, ___ U.S. ___, 112 S.Ct. 296, 116 L.Ed.2d 241 (1991). First, the court must determine whether the "employee's speech touches upon a matter of public concern." *Id.* (citing *Connick*, 461 U.S. 138, 103 S.Ct. 1684). If the speech involved a matter of public concern, the court must then balance "the interests of the employee in making the statement against the public employer's interest in the effective and efficient fulfillment of its responsibilities to the public." *Id.* (citing *Pickering v. Board of Educ.*, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968)). These first two steps involve questions of law for the court. *Id.* Third, assuming the *Pickering* balancing test tipped in favor of the plaintiff, he or she must show that the protected speech was a "motivating factor" in the employer's detrimental employment decision. *Id.* (quoting *Mt. Healthy School Dist. v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471 (1977)). Finally, "if plaintiff makes this showing, the burden shifts to the employer to show by a preponderance of the evidence that it would have reached the same decision in the absence of the protected activity." *Id.* The third and fourth steps involve questions of fact for the jury. *Id.*

Powell v. Gallentine, 992 F.2d 1088, 1090 (10th Cir. 1993).

Speech pertaining to a governmental agency's "discharg[e] [of] its governmental responsibilities" ordinarily will be regarded as speech on a matter of public concern; whereas, speech pertaining to internal personnel disputes and working conditions ordinarily will not be

so regarded. *Connick v. Myers*, 461 U.S. 138, 148 (1983). A court consider the speaker's motive in determining whether the speech was calculated to redress personal grievances; or, whether the speech has a "broader public purpose." *Conaway v. Smith*, 853 F.2d 789, 796 (10th Cir. 1988). A court also should consider the content, form and context of a given statement, as revealed by the whole record. *Connick*, 461 U.S. at 147-48.

Tytor essentially argues that her speech with Ferneti was protected under the First Amendment because her supervisor, Benoit, banned her from speaking to the one person with whom she needed to speak to best perform her teaching job. In other words, Tytor urges that she could not properly discharge her public function without speaking regularly to Ferneti. Tytor asserts that the content, form and context of her speech with Ferneti concerned educating children with disabilities, i.e., a public concern.

This Court reasons that Tytor's speech is not a matter of public concern. Tytor's speech is readily distinguished from other cases in the Tenth Circuit which held that the plaintiff's speech concerned a matter of public interest. For example, Tytor's speech did not seek "to bring to light actual or potential wrongdoing or breach of public trust," i.e., she did not act as a whistleblower in exposing corruption. *See Connick*, 461 U.S. at 148; *Powell*, 992 F.2d at 1090-91 (a professor's allegations of grade fraud at a university were statements of public concern); *Luethje v. Peavine School Dist. of Adair Co.*, 872 F.2d 352, 355 (10th Cir. 1989) (employee's complaints about unsanitary practices in the school cafeteria and the administration's refusal to address the employee's complaints dealt with matters of public concern). Nor did Tytor's speech concern social or political issues. *See, e.g.,*

Rankin v. McPherson, 483 U.S. 378, 385-87 (1987); *Durant v. Independent School Dist. No. 16*, 990 F.2d 560, 562 (10th Cir. 1993) (speech associated with actively campaigning for incumbent school board member during election was matter of public concern and, therefore, protected speech). Nor did Tytor's speech concern allegedly discriminatory employment practices. *See, e.g., Langley v. Adams County, Colo.*, 987 F.2d 1473, 1479 (10th Cir. 1993) (employee's statements opposing allegedly discriminatory employment practices constitutes speech on matters of public concern); *Patrick v. Miller*, 953 F.2d 1240, 1246 (10th Cir. 1991) (city finance director's statements opposing his employer's discriminatory treatment of a co-worker dealt with speech of public concern).

The Court further observes that Tytor's argument admits of a strange irony. Tytor urges that this Court characterize her speech with Ferneti as a matter of public concern because the defendants' ban on her speech allegedly prevented her from serving the best interests of her students. Yet, Tytor herself submitted supporting documents which stated that she worked well with her students despite the supposed, all-consuming ban on her speech with Ferneti. *See, e.g.*, Plaintiff's Resistance To Defendants' Motion for Summary Judgment, Exhibits 1-16. Thus, the best that can be said about Tytor's speech with Ferneti is that it was job-related, and that Tytor and Ferneti believed that Tytor would be better able to serve the children she treated if she could speak regularly with Ferneti. *See, e.g.*, Affidavit of Casper Ferneti, Ph.D. at ¶4.

The Court acknowledges that the Supreme Court has broadly defined that which constitutes speech of a public concern. *See, e.g., Rankin v. McPherson*, 483 U.S. 378,

107 S.Ct. 2891, 2898 (1987); *Luethje v. Peavine School Dist. of Adair Co.*, 872 F.2d 352, 355 (10th Cir. 1989). However, the Court concludes that Tytor's speech did not rise to the level of "public concern" as that standard is articulated in the Tenth Circuit case law.

In any event, even if Tytor's speech were a matter of public concern, the defendants adduced substantial evidence in support of their motion that Tytor's speech and/or association with Ferneti impaired the discipline and effective operation of the school. *Powell*, 992 F.2d at 1090; *Luethje*, 872 F.2d at 355 (citing *Conaway*, 853 F.2d at 797). Benoit desired that Tytor minimize her contact with Ferneti because other educators with whom Ferneti and Tytor worked perceived that the two had "hidden agendas." Deposition of James M. Benoit at 87. Benoit expressed concern that Tytor's relationship with Ferneti might injure staff relations. *Id.* The supporting documents further suggest that the alleged ban on speech was not "all-consuming," that Tytor could speak with Ferneti on the phone if she needed, and that the purpose of Benoit's action simply was to quell perceptions by other employees that Ferneti and Tytor operated under "hidden agendas" and, therefore, were not team players. Benoit Depo. at 87-9, 108-10. It appears that Benoit acted rationally to further the effective running of the school district, and, thus, the balance of interests would tip in favor of the defendants in this instance.

2. Whether the defendants breach Tytor's contract.

To the extent Tytor contends that the defendants placed unconstitutional restrictions on her employment, the Court finds that the defendants did not breach Tytor's employment contract for the same reasons as

articulated in part "1" of this order. Tytor does not allege that the defendants violated any other provisions of her one-year contract. She admits that the defendants paid her all amounts owed to her under her one-year contract. Deposition of Catherine T. Tytor at 32. Thus, the Court concludes that it must grant the defendants' motion on Tytor's breach of contract claim because there exist no genuine issues of material fact in this regard.

3. Whether Tytor suffered actionable emotional distress.

Under *Leithead v. American Colloid Co.*, 721 P.2d 1056, 1066 (Wyo. 1986), a cause of action for the intentional infliction of emotional distress requires "conduct which goes beyond all possible bounds of decency, is regarded as atrocious, and is utterly intolerable in a civilized community." *Id.* The Court finds that the defendants actions were not "beyond all possible bounds of decency" for several reasons. First, the restrictions placed on Tytor by the defendants were not "atrocious." Tytor could communicate with Ferneti by telephone; and, in any event, Tytor's work with her students was relatively unaffected by the restrictions. Second, the defendants did not condition Tytor's employment on "impossible goals" as proved by Tytor herself, since she continued to work well with her students throughout the period in question. Third, the letter Benoit placed in Tytor's personnel file did not rise to the level of "atrocious conduct." Thus, the Court concludes that Tytor has failed to allege sufficient facts in this regard to survive summary judgment.

THEREFORE, IT IS

ORDERED that the defendants' Motion for Summary Judgment be, and the same hereby is, GRANTED.

Dated this 9th day of August, 1993.

/s/ Clarence A. Brimmer
UNITED STATES DISTRICT JUDGE